Jabatan Kastam Diraja Malaysia & Ors v Apple International Co Ltd (Japan)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01 (NCVC) (W)-398–12 OF 2015
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
5 APRIL 2017

Customs and Excise — Motor vehicle — Import of cars — Customs Department seized 96 cars imported from Japan left unclaimed at port — Service and advertisement of notices of seizure and forfeiture of cars by Customs Department on known parties produced no response — Whether seizure and forfeiture of cars under ss 114(1) and 128(1) of Customs Act 1967 validly done — Whether respondent not being owner of the cars had no locus standi to sue appellants for their value

The High Court had allowed the respondent's claim against the appellants and ordered them to jointly and/or severally pay the respondent RM9,531,677.16, being the value of 96 Nissan Murano cars ('the cars') allegedly belonging to the respondent which the appellants had converted to their own use. The court had also ordered damages as assessed by the registrar to be paid to the respondent, a company incorporated in Japan. The respondent had initially included Impul Auto (M) Sdn Bhd ('Impul Auto') as a defendant but withdrew the case against it during the trial. The respondent claimed it exported the cars to Malaysia between April and July 2006 based on the representation of one Jerry Tan, who said that he represented Impul Auto and had a permit to import cars into Malaysia. However, for more than two months after the cars arrived in Malaysia and were stored at the Vehicle Terminal Centre ('VTC') at Port Klang, no one claimed the cars. The Customs Department seized the cars on suspicion they were imported without a permit and without payment of customs duties. Notices of the seizure were issued to VTC and to Impul Auto because the bills of lading and the manifest showed Impul Auto was the consignee. The appellants said the shipping documents stated that the shipper and exporter of the cars was 'Impul International Co Ltd' and not the respondent whose name did not appear anywhere. Impul Auto, however, denied ownership of the cars. The cars were subsequently forfeited under s 128(1) of the Customs Act 1967 ('the Customs Act') and notices of the forfeiture were served on Impul Auto and advertised in a local daily newspaper. Under s 128(1) of the Customs Act where there was no prosecution in respect of seized goods, inter alia, the goods were deemed forfeited at the expiration of one month from the date of seizure unless before such expiration, any person claiming to be the owner of the seized goods had made a written application for

their return. The respondent claimed it applied by letter dated 3 June 2013 for the return of the cars but the first appellant replied that the cars had already been forfeited. The respondent also claimed that s 114(3) of the Customs Act had been breached because notices of the seizure were not given to the respondent or its agent. The trial court held the notices of seizure of the cars were null and void and in breach of s 114 of the Customs Act. The court also held the appellants could have carried out investigations to find out who was the owner of the cars but it did not do so.

Held, allowing the appeal:

(1) The respondent's claim was clearly unsustainable having regard to the validity of the seizure and the forfeiture of the cars under ss 114(1) and 128(1), respectively, of the Customs Act, and the lack of locus standi of the respondent to bring the instant action against the appellants (see para 55).

(2) As the contract for the sale and purchase of the cars between the respondent and Impul Auto was a CIF (cost, insurance and freight) contract under which the respondent was responsible for the cost of insurance and freight, and as the evidence showed the bill of lading and invoice had been faxed to Impul Auto in March–July 2006, payment for the cars was due to the respondent even before the cars had arrived in Malaysia. Ownership had changed hands from the respondent to Impul Auto and the respondent no longer had any rights over the cars. This meant the respondent was no longer the owner of the cars and had no locus standi to claim for the cars and to institute the present action against the appellants. It was Impul Auto as the importer and consignee, if at all, that had the locus standi to sue the appellants and not the respondent. On the facts, it was obvious the respondent's real complaint was for non-payment of the cars by Impul Auto. Accordingly, it should have sued Impul for breach of contract and not the appellants, which in fact it did, except that for reasons which were not clear, it withdrew the case against Impul Auto midway through the trial (see paras 50–53).

(3) The trial judge's conclusion that the respondent was the owner of the cars was premised on the finding that the respondent was the exporter of the cars. This was erroneous. The respondent was not an exporter within the meaning of s 2 of the Customs Act. 'Exporter' in s 2 only referred to an exporter from Malaysia and not an exporter from Japan. The Customs Act only applied to Malaysia and had no extra-territorial jurisdiction for the purpose of determining who the 'exporter' of the cars was (see paras 48–49).

(4) The respondent's letter of 3 June 2013 was not a valid letter of claim under s 128(1)(a) or (b) of the Customs Act. It was not written within one calendar month from the issuance of the notices of seizure on 16

October 2006 and 3 October 2012 respectively. In fact, it was written more than one year after the issuance of the last of the notices of seizure (see para 22).

(5) Having regard to the language used in s 114(3) of the Customs Act, the requirement for the written notice of seizure to be given forthwith was only mandatory where both the owner of the goods and his place of abode were known. If they were not known, or if the seizure was made in the presence of the offender or the owner or his agent, the seizing officer was not required to give the notice to any person, let alone to give it 'forthwith' (see para 28).

(6) The circumstances under which the cars were imported into Malaysia were very suspicious and this was magnified by the fact no one came forward to produce the import permit and to pay customs duties for the cars. Under the circumstances, the respondent was not, in any event, entitled to damages: see s 132 of the Customs Act (see para 46).

[Bahasa Malaysia summary

Mahkamah Tinggi telah membenarkan tuntutan responden terhadap perayu-perayu dan memerintahkan mereka secara bersama dan/atau berasingan membayar responden RM9,531,677.16, untuk nilai harga 96 kereta-kereta Nissan Murano ('kereta tersebut') yang dikatakan milik responden yang mana telah ditukar oleh perayu-perayu untuk kegunaan mereka sendiri. Mahkamah juga telah memerintahkan ganti rugi seperti ditaksir oleh pendaftar dibayar kepada responden, sebuah syarikat yang diperbadankan di Jepun. Responden pada mulanya telah memasukkan Impul Auto (M) Sdn Bhd ('Impul Auto') sebagai defendan tetapi telah menarik balik kes terhadapnya semasa perbicaraan. Responden mendakwa ia telah mengeksport kereta tersebut ke Malaysia antara April dan Julai 2006 berdasarkan representasi Jerry Tan, yang mengatakan bahawa dia mewakili Impul Auto dan mempunyai permit untuk mengimport kereta tersebut masuk ke Malaysia. Walau bagaimanapun, untuk lebih dari dua bulan selepas kereta tersebut tiba di Malaysia dan disimpan di Pusat Terminal Kenderaan ('PTK') di Port Klang, tiada sesiapa yang menuntut kereta tersebut. Jabatan Kastam telah merampas kereta tersebut kerana mensyaki ia diimport tanpa permit dan tanpa bayaran duti kastam. Notis-notis rampasan telah dikeluarkan kepada PTK dan kepada Impul Auto kerana bil muatan dan jelas nyata menunjukkan Impul Auto merupakan penerima konsain itu. Perayu-perayu menyatakan dokumen-dokumen penghantaran menunjukkan bahawa penghantar dan pengeksport kereta tersebut adalah 'Impul International Co Ltd' dan bukan responden yang mana namanya tidak kelihatan di mana-mana. Impul Auto, bagaimanapun, menafikan pemilikan kereta tersebut. Kereta tersebut kemudian telah dilucuthak di bawah s 128(1) Akta Kastam 1967 ('Akta Kastam tersebut') dan notis-notis pelucuthakan telah disampaikan ke atas Impul Auto dan diiklankan dalam akhbar harian tempatan. Di bawah s 128(1)

Akta Kastam tersebut di mana tidak terdapat pendakwaan berkaitan rampasan barangan, antara lain, barangan yang dianggap telah dilucuthak pada tamat tempoh satu bulan dari tarikh rampasan kecuali sebelum tamat tempoh tersebut, mana-mana orang yang mendakwa pemilik barangan yang dirampas telah membuat permohonan bertulis untuk pemulangannya. Responden mendakwa ia telah memohon melalui surat bertarikh 3 Jun 2013 untuk pemulangan kereta tersebut tetapi perayu pertama telah menjawab bahawa kereta tersebut telahpun dilucuthak. Responden juga mendakwa bahawa s 114(3) Akta Kastam tersebut telah dilanggar kerana notis-notis rampasan itu tidak diberikan kepada responden atau ejennya. Mahkamah perbicaraan memutuskan notis-notis rampasan tersebut adalah terbatal dan tidak sah dan melanggar s 114 Akta Kastam tersebut. Mahkamah juga memutuskan perayu-perayu boleh menjalankan siasatan untuk mencari siapa pemilik kereta tersebut tetapi tidak berbuat sedemikian.

Diputuskan, membenarkan rayuan:

(1) Tuntutan responden jelas tidak dikekalkan dengan mengambil kira kesahan rampasan dan pelucuthakan kereta tersebut di bawah ss 114(1) dan 128(1), masing-masingnya, Akta Kastam, dan tiada locus standi untuk responden memulakan tindakan ini terhadap perayu-perayu (lihat perenggan 55).

(2) Oleh kerana kontrak untuk jual beli kereta tersebut antara responden dan Impul Auto adalah kontrak KIT (kos, insuran dan pengangkutan) di mana responden bertanggungjawab untuk kos insurans dan pengangkutan, dan oleh kerana keterangan menunjukkan bil muatan dan invois telah difakskan kepada Impul Auto pada Mac–Julai 2006, bayaran untuk kereta tersebut kena dibayar kepada responden malah sebelum kereta tersebut tiba di Malaysia. Pemilikan telah bertukar tangan daripada responden kepada Impul Auto dan responden bukan lagi pemilik kereta tersebut dan tidak mempunyai locus standi untuk menuntut kereta tersebut dan untuk memulakan tindakan ini terhadap perayu-perayu. Ia adalah Impul Auto sebagai pengimport dan pemegang konsain, jika ada pun, yang mempunyai locus standi untuk menyaman perayu-perayu dan bukan responden. Berdasarkan fakta tersebut, ia jelas yang aduan sebenar responden adalah untuk kereta tersebut yang tidak dibayar oleh Impul Auto. Sewajarnya, ia patut menyaman Impul kerana pelanggaran kontrak dan bukan perayu-perayu, yang sebenarnya ia telah, kecuali untuk sebab-sebab yang tidak jelas, ia menarik balik kes terhadap Impul Auto separuh jalan perbicaraan itu (lihat perenggan 50–53).

(3) Kesimpulan hakim perbicaraan bahawa responden adalah pemilik kereta tersebut berpremiskan penemuan bahawa responden adalah pengeksport kereta tersebut. Ini adalah salah. Responden bukan pengeksport dalam maksud s 2 Akta Kastam tersebut. 'Exporter' dalam s 2 hanya merujuk

kepada pengeksport dari Malaysia dan bukan pengeksport dari Jepun. Akta Kastam tersebut hanya terpakai kepada Malaysia dan tidak mempunyai bidang kuasa luar wilayah bagi tujuan menentukan siapa 'exporter' kereta tersebut (lihat perenggan 48–49).

(4) Surat responden bertarikh 3 Jun 2013 adalah surat tuntutan yang tidak sah di bawah s 128(1)(a) atau (b) Akta Kastam tersebut. Ia tidak ditulis dalam satu bulan kalender daripada keluaran notis-notis rampasan pada 16 Oktober 2006 dan 3 Oktober 2012 masing-masing. Bahkan, ia telah ditulis lebih daripada setahun selepas keluaran notis-notis rampasan terakhir (lihat perenggan 22).

(5) Berdasarkan bahasa yang digunakan dalam s 114(3) Akta Kastam tersebut, keperluan untuk notis rampasan bertulis diberikan dengan serta merta hanya mandatori jika kedua-dua pemilik barangan dan tempat tinggalnya diketahui. Jika ia tidak diketahui, atau jika rampasan dibuat dengan kehadiran pesalah atau pemilik atau ejennya, pegawai yang merampas tidak dikehendaki memberi notis kepada sesiapa, lebih lagi untuk memberinya 'forthwith' (lihat perenggan 28).

(6) Keadaan di mana kereta tersebut diimport ke dalam Malaysia amat mencurigakan dan ini ditambah lagi dengan fakta tiada sesiapa yang datang untuk mengemukakan permit import dan untuk membayar duti kastam untuk kereta tersebut. Di bawah keadaan berikut, responden tidak, dalam apa keadaan, berhak mendapat ganti rugi: lihat s 132 Akta Kastam (lihat perenggan 46).]

Notes

For a case on motor vehicle in general, see 6(1) *Mallal's Digest* (5th Ed, 2015) para 163.

Legislation referred to

Customs (Prohibition of Imports) Order 1998
Customs Act 1967 ss 2, 114(1), (3), 115(1), (1)(a), (1)(b), 126, 128, 128(1), (1)(a), (1)(b), (2), (3), 132, 135(1)(d)
Public Authorities Protection Act 1948 s 2(a)

Appeal from: Civil Suit No 21NCVC-83–11 of 2013 (High Court, Kuala Lumpur)

Rosli Ahmad (Habibah Haron with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
Harpal Singh Grewal (Harwinder Jaur, Nahvinah Selvaraj and Shailender Bhar with him) (AJ Ariffin Yeo & Harpal) for the respondent.

Abdul Rahman Sebli JCA:

INTRODUCTION

[1] This appeal by the appellants is against the decision of the Kuala Lumpur High Court allowing the respondent's claim which was founded on conspiracy to defraud, breach of fiduciary duties, breach of statutory duties, misfeasance in public office and the tort of conversion.

[2] Following the decision, the appellants were ordered to jointly and/or severally pay to the respondent a sum of RM9,531,677.16, which is the value of 96 units of Nissan Murano cars which the respondent claimed to be its properties and which the appellants were alleged to have converted to their own use, and for damages to be assessed by the senior assistant registrar. The appellants were also ordered to pay costs of RM80,000 to the respondent.

[3] We heard arguments on 21 November 2016 and reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment, which we now deliver in the presence of counsel for both parties.

THE FACTS OF CASE

[4] The salient facts are as follows. In early 2006, a person by the name of Jerry Tan who claimed to be a representative of Impul Auto (M) Sdn Bhd (now known as Safz Auto Sdn Bhd — after this referred to as 'Impul Auto') represented to the respondent, a company incorporated in Japan, that he had an import permit (AP) to import cars into Malaysia. It was based on this representation, according to the respondent, that it exported the 96 units of Murano cars to Malaysia between April and July 2006.

[5] It needs to be mentioned that at the High Court, Impul Auto was conjoined as the fifth defendant, but the case against it was withdrawn by the respondent in the midst of the trial, thus leaving only the appellants to face the respondent's claim. That explains why Impul Auto is not a party to this appeal.

[6] The 96 units of Murano cars arrived in Malaysia on two different dates in two different batches of 84 and 12, and were stored at the Vehicle Terminal Centre ('VTC'), Northport and Westport, Port Klang. From the bills of lading and the manifest, the consignee was Impul Auto. The cars were supposed to be claimed by Jerry Tan on behalf of Impul Auto but he never did and the cars were left unclaimed at the VTC for more than two months. No import permit was produced for the cars. In fact, no import permit for the cars was ever produced to this day. Nor has any customs duty been paid for the cars.

A THE SEIZURE AND FORFEITURE

[7] Since no one claimed the cars, they were seized by the customs department on suspicion that they were imported into Malaysia without permit and without payment of customs duties, an offence under s 135(1)(d) of the Customs Act 1967 ('the Customs Act') and the Customs (Prohibition of Imports) Order 1998. The law as encapsulated in s 114(1) of the Customs Act envisages four situations where goods may be seized by a customs officer, namely:

(a) where there has been committed an offence under the Customs Act or any regulation made thereunder;

(b) where there has been a breach of the provisions of the Customs Act or any regulation made thereunder;

(c) where there has been a breach of any restriction or condition subject to or upon which any licence or permit has been granted; and

(d) where there is reasonable cause to suspect any of the above transgressions.

[8] Under s 126 of the Customs Act, all goods liable to seizure are liable to forfeiture. Two notices of seizure were issued for the seizure of the first batch of 84 cars, the first being on 16 October 2006 which was issued to VTC and the second on 23 October 2010 issued to Impul Auto. The notice of seizure in respect of the second batch of 12 cars was issued on 25 September 2012, also to Impul Auto.

[9] The cars were subsequently forfeited under s 128(1) of the Customs Act 1967. The notice of forfeiture in respect of the first batch was served on Impul Auto on 10 January 2011. No notice of forfeiture was issued in respect of the second batch of 12 cars. What the appellants did in respect of this batch was to advertise the forfeiture in the *New Straits Times* on 15 October 2013. No one came forward to claim the cars within 30 days of the advertisement.

WHETHER CARS AUTOMATICALLY FORFEITED

[10] Having regard to the factual matrix of the case and the line of arguments advanced by the parties, it is clear that this appeal turns on s 128(1) of the Customs Act. To provide context, we reproduce below the whole of s 128:

> 128 (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph 115(1)(b) *shall be taken and deemed to be forfeited* at the expiration of one calendar month from the date of seizure of the goods *unless*, before such expiration —

(a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);

(b) a written application is made for the return of such goods under paragraph 115(1)(a) or (b); or

(c) such goods are returned under the said paragraph (a) or (b).

(2) Any person *asserting that he is the owner of such goods* or the proceeds of sale of such goods, as the case may be, *and that they are not liable to forfeiture* may give written notice to a senior officer of customs that he claims the same.

(3) On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no representation with regard to the goods, on the making of the decision the senior officer of customs shall, *if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection*, refer the claim to the Director General who may direct that such goods or the proceeds of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be, be released, or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision.

(4) The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph 115(1)(a) or (b), as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be.

(5) In any proceedings under subsection (4), section 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act. (Emphasis is added.)

[11] Section 128(1) thus provides for automatic forfeiture in the following circumstances:

(a) where there is no prosecution with regard to the goods seized (in this case the 96 Murano cars);

(b) where there is no claim for the goods at the expiration of one calendar month from the date of seizure;

(c) where there is no written application made for the return of the goods under para 115(1)(a) or (b) at the expiration of one calendar month from the date of seizure; and

(d) where the goods are returned under paragraph (a) or (b) of 115(1).

[12] It is undisputed that there was no prosecution with regard to the seizure of the 96 Murano cars. The issue therefore boils down to the question of whether the circumstances permitted for automatic forfeiture of the cars. If the circumstances so permitted, then the question of whether the appellants had breached their fiduciary and statutory duties, or had been guilty of misfeasance in public office, or had converted the cars to their own use does not arise at all.

[13] The forfeited first batch of 84 cars were disposed of as gifts by the customs department to various government departments. This was confirmed by the appellant's key witness, Dato' Hj Zainal Abidin bin Taib ('DW7') who in his witness statement said as follows:

> 84 kenderaan telah dilupuskan dengan cara didaftarkan atas nama Ketua Pengarah Kastam dan dilupuskan secara 'hadiah' untuk kegunaan rasmi pelbagai jabatan.

[14] In cross-examination, DW7 was asked by learned counsel for the respondent if it was proper for the Customs Department to dispose of the cars by way of gift. This was DW7's answer:

> It is not wrong to hadiah kepada Jabatan sebab within the scope of Treasury instruction. Seperti cakap tadi, kereta boleh jual, sama ada by tender, kereta boleh lupus, sama ada kalau kereta boleh di bakar atau di buang sungai dan sebagainya, ataupun dilelong ataupun di hadiah.

THE SUBMISSIONS AND OUR DECISION

[15] It is not the respondent's case that such manner of disposal, by way of gift to various government departments, was illegal. The main plank of the appellants' defence to the respondent's claim was that the cars were deemed to have been forfeited for the reason that upon the expiration of one calendar month from the dates of seizure:

(a) no prosecution was instituted with regard to the seizure of the cars;

(b) no claim to the cars was made under sub-s (2);

(c) no written application for the return of the cars was made under s 115(1)(a) or (b); and

(d) the cars were not returned under paragraph (a) or (b) of s 115(1).

[16] Learned counsel for the respondent took umbrage at the failure by the appellants to prosecute the respondent, the VTC or Impul Auto under s 135(1)(d) of the Customs Act. He submitted as follows:

> The only reason no charges or prosecution was proffered against the respondent,

VTC or Impul was if the appellants had brought charges or prosecuted the respondent, VTC or Impul, they would not have been able to appropriate the vehicles as they would first have to obtain a court order under s 127(1) of the Customs Act (p 107, TAB4) before forfeiting the vehicles and the manner of forfeiture of the vehicles would have been before the court, an independent body and the appellants would have to answer on the manner in which they were to dispose the vehicles.

[17] With due respect to learned counsel, the allegation is pure speculation. In any event, the law provides under s 128(1) of the Customs Act that within one month of the seizure of the cars, the respondent had every right to claim the cars by notice in writing. It was because no such claim was filed by the respondent or anyone else that the cars were forfeited automatically.

[18] It is the appellants' contention that since there was no prosecution with regard to the seizure of the cars and no application was made under para (a) or (b) of s 128(1), there was no requirement for the matter to be referred to the Director General for his decision under s 128(3) and thus the cars remained automatically forfeited. Learned counsel for the respondent contended otherwise. It was submitted that the appellants' reliance on s 128(1) was misplaced as on 20 January 2012 the respondent had written a letter to the first appellant for the return of the cars and again on 3 June 2013.

[19] If it is true that the respondent had applied in writing for the return of the cars *within one calendar month from the dates of seizure* pursuant to s 128(1)(b), then learned counsel would of course be right in saying that there could be no automatic forfeiture of the cars. In that situation, s 128(3) would take effect, which is for the claim to be referred to the Director General for his decision either to release the cars pursuant to s 115(1), or to direct such senior officer of customs, by information in the prescribed form, to refer the matter to a first class magistrate for his decision.

[20] To support his contention that an application for the return of the cars had been made by the respondent, learned counsel referred us to the solicitor's letter dated *3 June 2013* the contents of which read as follows:

Kami merujuk kepada perkara diatas dimana kami mewakili Apple International Co (Japan) Ltd dan diarahkan seperti berikut:

(1) Diantara bulan April dan Julai 2006, anakguam kami mengeksport sebanyak 96 buah kereta ke Malaysia [*Kenderaan-kenderaan tersebut*] (Butir-butir kenderaan dan maklumat perkapalan dilampirkan sebagai Lampiran 1);

(2) Pengimport kenderaan-kenderaan tersebut adalah Impul Auto (M) Sdn Bhd;

(3) Kenderaan-kenderaan tersebut tiba di Malaysia dalam pelbagai kapal diantara April dan Julai 2006 (Sila rujuk kepada Lampiran 1 untuk maklumat lanjut);

(4) Walaubagaimanapun, kenderaan-kenderaan tersebut dirampas apabila ia tiba di Pelabuhan Klang oleh Jabatan Kastam atas dakwaan bahawa Permit Import ('AP') untuk kenderaan-kenderaan tersebut adalah defektif;

(5) Kami dimaklumkan bahawa kenderaan-kenderaan tersebut kini ditempatkan di Gudang Kastam di Pelabuhan Klang;

(6) Anakguam kami tidak dimaklumkan secara bertulis sebab-sebab kenderaan-kenderaan tersebut disita kecuali melalui notis lisan bahawa penyitaan itu dibuat atas dakwaan bahawa APs tersebut adalah defektif;

(7) Oleh yang demikian, telah berlaku suatu pengingkaran notis mandatory di bawah Seksyen 114(3) Akta Kastam 1967 yang meletakkan satu keperluan mandatory oleh pihak Kastam untuk memaklumkan kepada tuan punya barang yang disita itu secara bertulis, mengenai rampasan dan penyitaan itu atas alasan-alasan baginya;

(8) Anakguam kami *menuntut kepulangan kenderaan-kenderaan tersebut* dan juga pampasan yang munasabah akibat kerugian yang dialami sepanjang tujuh (7) tahun ini yang disebabkan oleh rampasan dan penyitaan yang tidak sah ini;

Sila memberi jawapan kepada surat kami dalam tempoh masa empat belas (14) hari dari tarikh penerimaan surat ini dan jikalau gagal untuk berbuat demikian, anakguam kami memelihara haknya untuk memfailkan tindakan guaman terhadap pihak Kastam dan/atau agen-agennya tanpa sebarang rujukan kepada pihak Kastam dimana pihak Kastam akan bertanggungjawab terhadap semua kerugian, gantirugi, kos, dan perbelanjaan yang ditanggung oleh anakguam kami disebabkan oleh pengingkaran pihak Kastam.

Kami telah diarahkan bahawa anakguam kami bersedia untk merundingkan suatu penyelesaian mengenai perkara ini.

(Emphasis added.)

[21] It was a letter demanding for the return of the cars accompanied by a threat to take legal action if the demand was not met within 14 days after receipt of the letter. The first appellant's response to the letter was to inform the respondent that they were not returning the cars as they had been forfeited under s 128(1) of the Customs Act. The respondent then filed the present action against the appellants on 15 November 2013.

[22] The first thing to note with regard to the respondent's letter of 3 June 2013 is that it was not written within one calendar month from the issuance of the notices of seizure on 16 October 2006 and 3 October 2012 respectively. In fact, it was written more than one year after the issuance of the last of the notices of seizure. We can therefore say at once that it was not a valid letter of

claim under s 128(1)(a) or (b) of the Customs Act.

[23] As for learned counsel's claim that there was an earlier letter dated 20 January 2012 asking for the return of the cars under s 128(2) of the Customs Act, it was actually not a letter but an e-mail that was sent, not by the respondent, but by Interpol Tokyo to Interpol Kuala Lumpur. We reproduce below the material contents of the email:

> Reference is made to your message dated December 8, 2011.
>
> We would like to provide you with the following information on the captioned case;
>
> (1) All vehicles were manufactured between February and May, 2006 in Japan.
>
> (2) They were shipped to several Nissan dealerships in our country.
>
> (3) According to the Land Transport Bureau, a company named Apple International Company Ltd registered all vehicles except No.25 TZ50-01164 in your list (but a vehicle with the number of TZ50-010644 is included in the exported list) would be shipped for Malaysia on May 7, 2006.
>
> (4) None of them are registered as stolen in our country.
>
> (5) According to Apple International, the company wants to return the vehicles back to Japan, because they have not received all the payment of the vehicles yet.
>
> Remarks:
>
> We would like you to tell us if there is any possibility that Apple International can get them back to Japan, and if affirmative, give us current judicial status of the vehicles and contact details about the person in charge of this case.
>
> Regards Interpol Tokyo.

[24] With due respect to learned counsel, this was not a claim under s 128(2) of the Customs Act. In the first place, it was not even sent by the respondent. For a claim under that subsection to be a valid claim, it must be submitted by the respondent itself, being the party asserting that it was the owner of the cars and that they were not liable to forfeiture, not by a third party.

[25] The respondent's witness, Mr Akihiko Haibara ('SP4') who is a director of the respondent could not even remember if he did send any notice to the customs department for the return of the vehicles. Under cross-examination by learned senior federal counsel (pp 215–216 of the record of appeal), these were his answers:

> HBH: Ok. When you check the cars, do you ask Customs officers, do you ask the Customs officers why, make inquiries about your cars to the Customs officers?

HAIBARA: No, I didn't.

HBH: And you didn't send any notice also to the Customs officers asking about the car?

PTJ: Notice?

HBH: Yes. Notice.

PTJ: Notice of what?

HBH: Notice. Send a notice like a letter. For returning of the vehicles. PTJ: He would like to know, ask you to repeat the question again.

HBH: Ok. Did you send any notice to the Customs for the return of the vehicles?

HAIBARA: I don't have that memory.

[26] Clearly therefore, there was no evidence of an earlier letter dated 20 January 2012 claiming for the return of the cars. The only letter before the court was the letter dated 3 June 2013 which, as we said, was not written within the time limited by s 128(1) and therefore does not constitute a valid claim.

[27] It was next submitted by learned counsel for the respondent that there was non-compliance with s 114(3) of the Customs Act when the seizing officer failed to 'forthwith' inform the respondent or its agent of the seizure of the cars in writing either personally or by post. If that is true, the one month period for the respondent to claim the cars under s 128(1) had not started to run and time would remain at large. What the contention amounts to is that the automatic forfeiture of the cars had not and could not have taken place. Section 114(3) provides as follows:

> 114(3) Whenever any goods, conveyances, vessels or aircraft are seized under this Act, the seizing officer shall forthwith give notice in writing of such seizure and the grounds thereof to the owner of the goods, if known, either by delivering such notice to him personally or by post at his place of abode, if known:
>
> Provided that such notice shall not be required to be given where such seizure is made on the person, or in the presence of the offender or the owner or his agent, or in the case of a vessel or an aircraft, in the presence of the master or pilot, as the case may be.

[28] Having regard to the language used in s 114(3), it is important to appreciate that the requirement for the written notice of seizure to be given 'forthwith' is only mandatory where both the owner of the goods and his place of abode are known. If they are unknown, or if the seizure is made in the presence of the offender or the owner or his agent, the seizing officer is not even required to give the notice to any person, let alone to give it 'forthwith'.

[29] The appellants' case was that they did not know who owned the 96

Murano cars and that there was no document to show that they were owned by the respondent. In fact, based on the bill of lading at pp 610–638 of the record of appeal, the shipper and exporter of the cars was 'Impul International Co Ltd' and not the respondent, Apple International Co Ltd (Japan). The name of the respondent did not appear anywhere in the document. This, according to the appellants, was the reason why they did not serve the notices of seizure on the respondent and not because they wanted to convert the cars to their own use.

[30] The word 'owner' is defined by s 2 of the Customs Act as follows:

> 'owner' in respect of goods includes any person (other than an officer of customs acting in his official capacity) being or holding himself out to be the owner, importer, exporter, consignee, agent or person in possession of, or beneficially interested in, or having any control of, or power of disposition over, the goods.

[31] The definition is wide enough to include any person who holds himself out to be the owner of the goods. The respondent's contention is that the appellants knew all along that the 96 Murano cars belonged to the respondent and that their decision to issue the notices of seizure to the VTC instead of to the respondent was done deliberately in order to convert the cars to their own use. It was contended that the issuance of the notices of seizure was in breach of s 114(3) of the Customs Act.

[32] In his submission learned counsel seems to imply that the notices of seizure were only served on the VTC. This is not quite correct as the notices were also served on Impul Auto as the consignee, albeit 4 1/2 years later. In any case it was not wrong for the appellants to serve the notices of seizure on the VTC as the VTC had control over the cars, thus making it 'owner' as the word is defined in s 2.

[33] Is there evidence to show that the appellants knew that the respondent was the owner of the cars, as alleged by the respondent? The learned trial judge did not make any specific finding on this pure question of fact but nevertheless took the view that the appellants must be faulted for their failure to carry out any investigation to find out who the owner of the cars was. This is what the learned judge said in her judgment:

> 93. In this regard, I find the plaintiff's contention that customs had deliberately failed or willfully neglected to conduct investigation into the ownership of the vehicles as they had an ulterior motive to be highly probable and plausible.
>
> 94. The customs officers deal with international shippers and consignees on a daily basis as they are the officers who control the entry of imports into the country. Hence, their familiarity and knowledge of consignees and shippers as disclosed in the manifest is unquestionable. The customs witnesses' claim that they were ignorant of the plaintiff's claim of ownership over the vehicles merely fortifies the

A inference that no proper or genuine investigation was carried out given the fact that details of the shippers and consignees are stated in the bills of lading.

95. It is not disputed that Impul denied it was the owner. This begs the question as to whether customs made any attempt to elicit information from Impul with regard to the exporter. It beggars belief that it took them four years to discover Impul was the consignee, in light of the bills of lading.

B

96. Taking the foregoing into consideration, I am of the view that the notices of seizure for the vehicles are null and void and are not in accordance with s 114 of the Act.

C

[34] With due respect to the learned judge, the question is not whether the appellants had carried out any investigation to find out who the owner of the cars was, given the fact that whoever imported the cars would and should naturally be the first person to show interest in the cars and to claim them. Going by the respondent's letter of demand referred to in para 20 above, the importer was none other than Impul Auto.

D

[35] It is beyond comprehension that cars worth RM9,531,677.16 were left unclaimed and left idle at the VTC for more than two months after their arrival from Japan. The only explanation for this bizarre inaction on the part of the importer, whoever he was, is that something was seriously wrong with the importation of the cars.

E

[36] The question to ask in the circumstances is whether the respondent (who claimed to be the owner of the cars) or its agent had made a claim under s 128(1)(a) or (b) of the Customs Act before the expiry of one calendar month from the dates of seizure. The evidence in this regard is irrefutable that no such claim was ever made by the respondent or its agent within the period prescribed by s 128(1).

F

G

[37] Nor did Impul Auto, the consignee, do so. Instead, it denied ownership of the cars. Perhaps the denial is understandable because if it had admitted to ownership, it would be exposing itself to criminal prosecution under s 135(1)(d) of the Customs Act.

H

[38] The appellants cannot be expected to wait *ad infinitum* for any person to come forward to claim the cars. That will impinge on s 128(1) itself. We have in this regard mentioned that the respondent's letter dated 3 June 2013 was not such claim as it was made outside the limitation period of one calendar month after the seizure of the cars.

I

[39] The respondent produced a faxed copy of a document showing 'Apple International' as the sender of the bill of lading in purported proof that the

appellants knew that the respondent was the exporter of the cars. The learned trial judge however rightly rejected this evidence as just anybody could send the document. It was not reliable proof that the respondent was the exporter of the cars.

[40] At the trial, the respondent also relied on an export certificate to show that it was the exporter of the cars, but it is obvious that this document was never marked as exhibit as the maker was not called to give evidence. It was only marked for identification (ID) purposes. No reliance should therefore be placed on this document. In any event, it was not a document that was issued by the respondent. It was issued by the District Transport Bureau of Japan.

[41] On the evidence, there can be no doubt that Impul Auto was the respondent's customer in whom it had placed full trust and confidence to deal with the cars on their arrival in Malaysia through its representative, Jerry Tan. Mr Yoshinobu Kubo ('SP1') who is the chief executive officer of the respondent in his evidence admitted that Impul Auto was the consignee or importer of the cars. This was also an *agreed fact*.

[42] The following testimony of Mr Akihiko Haibara under cross-examination by learned counsel for Impul Auto (before the suit against it was abruptly withdrawn by the respondent) at p 197 of the record of appeal will further attest to this:

> ASJ: I said is that how you operate your business, you are operating million dollars business and not having proper documentation and records and not knowing about it.
>
> HAIBARA – Well the company dealing only with very trusted customers, as such our way of communication is through short message (SMS) or telephone without formal documentation.

[43] Then at p 213 of the appeal record, Mr Akihiko Haibara gave the following answer to the question put by learned counsel for Impul Auto:

> AJS — Very well, My Lady. My last question, I put to him, there is no document from Impul, no communication from Impul to the Plaintiff throughout and there is no contract?
>
> HAIBARA – As far as I remember, no.

[44] Mr Akihiko Haibara did not even see the need to check with Impul Auto on the status of its representative, Jerry Tan. This is what he said in re-examination (p 216 of the record of appeal):

> HWK: Mr Haibara, this is re-examination of the questions that were asked by Mr Amarjeet and Puan Habibah. Now, the question that Mr Amarjeet asked you is

did you write a letter to Impul to ask about Jerry Tan. And you said no, you did not. Why did you not write a letter to Impul to ask about Jerry Tan? Why did you not write to Impul?

HAIBARA: I thought it is not necessary.

[45] To our mind, the reason why Mr Akihiko Haibara did not find it necessary to do so is obvious, and that is because he knew from the respondent's previous dealings with Impul Auto that Jerry Tan was indeed Impul Auto's representative. This is evident from his answers in cross-examination at p 198 of the record of appeal:

AJS: I will just move on now. So you said you deal with trusted customers. Is Jerry Tan a trusted customer? No, he must answer my question whether about Jerry Tan. That's all, is he or is he not? Very simple.

HAIBARA: Yes, for me.

AJS: Ok, yes.

YA: Your answer is yes.

HAIBARA: Yes.

AJS: Yes. Ok. Now how long you have known Jerry Tan since you first met him?

HAIBARA: I have known him three or four years.

[46] Mr Akihiko Haibara went on to confirm that he had known Jerry Tan even before 2005. The circumstances under which the cars were imported into Malaysia were very suspicious indeed and this is magnified by the fact that no one came forward to produce the import permit and to pay customs duties for the cars. Under the circumstances, the respondent was not, in any event, entitled to damages: see s 132 of the Customs Act which provides as follows:

> 132 No person shall in any proceedings before any court in respect of the seizure of any goods seized in exercise or the purported exercise of any power conferred under this Act, be entitled to the costs of such proceedings or to any damages or other relief other than the order for the return of the goods or the payment of their value *unless such seizure was made without reasonable cause*. (Emphasis added.)

[47] Although by definition the respondent was 'owner' of the cars, it does not mean that it was entitled as of right to the cars. Under s 115(1) of the Customs Act, the return of any goods seized is at the discretion of a senior officer of customs and only to *the owner thereof or to whom the person from whose possession, custody or control it was seized, or to such person as a senior officer of customs may consider entitled thereto*, not to any Tom Dick and Harry.

[48] The learned trial judge's conclusion that the respondent was the owner of the cars was premised on her finding that the respondent was the exporter of

the cars. This is erroneous as the respondent was not an exporter within the meaning of s 2 of Customs Act which defines the word 'exporter' as follows:

> exporter includes any person by whom any goods (including goods transferred from an importing aircraft or ship) are *exported from Malaysia* or supplied for use as aircraft's or ship's stores, and also the owner, or any person acting on his behalf, and any person who for customs purposes signs any document relating to goods exported or intended for exportation or supplied or intended for supply as aircraft's or ship's stores as aforesaid; (Emphasis added.)

[49] It is clear that an 'exporter' only refers to an exporter from Malaysia and not an exporter from Japan who exports cars to Malaysia like the respondent, if at all it was the entity that exported the 96 units of Murano cars to Malaysia. There can be no argument that the Customs Act only applies to Malaysia and has no extra-territorial jurisdiction for the purpose of determining who the 'exporter' of the cars was.

[50] There is another matter that is pertinent to the issue of ownership. The contract for the sale and purchase of the cars between the respondent and Impul Auto was a CIF contract, ie 'cost, insurance, freight contract', under which mode of business dealing the respondent was responsible for the cost of insurance and freight charges. When the ship set sail for Malaysia from Japan, the respondent would then send the bill of lading, insurance policy and invoice either by post or fax to Impul Auto.

[51] The evidence in this regard is that the bill of lading and invoice were sent by fax to Impul Auto in March–July 2006. This completed the contract between the respondent and Impul Auto, and payment for the cars would then be due to the respondent, even before the cars arrived in Malaysia.

[52] Ownership had thereafter changed hands from the respondent to Impul Auto and the respondent would no longer have any right over the cars. In other words the respondent was no longer the owner of the cars, which consequently means that it had no locus standi to claim for the cars and to institute the present action against the appellants. It was Impul Auto as the importer and consignee, if at all, that had the locus standi to sue the appellants and not the respondent.

[53] On the facts, it is obvious that the respondent's real complaint was for non-payment of the cars by Impul Auto. That being the case, the respondent's remedy was to sue Impul Auto for breach of contract instead of suing the appellants for the seizure and forfeiture of the cars, which in fact it did except that for reasons which are not clear, it withdrew the case against Impul Auto midway through the trial.

[54] At p 200 of the record of appeal, Mr Akihiko Haibara admitted under cross-examination that in the respondent's previous transactions with Impul Auto, payments were duly made by Impul Auto for the purchase of its cars. This is what he said:

> AJS: So you mean you closed about 2, 3, 4, 5, or maybe 10 deals with Impul Auto?
>
> HAIBARA: It is correct.
>
> AJS: So you receive payments from Impul Auto?
>
> HAIBARA: The payments were made.
>
> AJS: Payment was made by who?
>
> HAIBARA: That is how I acknowledge. Payment was made by Impul Auto. That is how I acknowledge it.
>
> AJS: You acknowledge what? You mean. Who paid you their payment? Who made the payment? The person?
>
> HAIBARA: Prior to the remittance into the bank account, Jerry Tan called me, Jerry Tan informed me through the telephone that amount to be remitted into the bank account. As such, I believe the payment was made by Impul Auto.
>
> AJS: And this is for which transaction?
>
> HAIBARA: I was referring to the old transactions with Jerry Tan prior to the 96 Murano export to Malaysia.

[55] It would thus appear that the appellants had wrongly been named as parties to the suit by the respondent. In any case, having regard to our decision on the validity of the seizure and forfeiture of the cars under ss 114(1) and 128(1) respectively of the Customs Act and the locus standi of the respondent to bring this action against the appellants, the claim against the appellants was clearly unsustainable.

[56] For the same reason, we find it unnecessary to deal with the rest of the issues raised by the appellants, including in particular the issue of limitation under s 2(a) of the Public Authorities Protection Act 1948.

[57] Having regard to the evidence, the applicable law and the submissions of the parties, we are satisfied that there is merit in the appellants' appeal to warrant appellate intervention with the decision of the learned trial judge. The appeal is therefore allowed with costs.

Appeal allowed.

Reported by Ashok Kumar